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DR ISMAIL ABDULLAH

v.

POH HUI LIN

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HIGH COURT MALAYA, JOHOR BAHRU
AZAHAR MOHAMED J
[CIVIL APPEAL NO: 12-56-2006]
4 NOVEMBER 2008

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TORT: *Negligence - Medical negligence - Allegation of - Whether first defendant negligent when he failed to inform risks of operation - Whether there was a duty to do so - Whether only material risks of operation need to be disclosed - Whether risks of acute pancreatitis and ARDS as a result of operation rare and minimal - Principle of Rogers v. Whitaker -*

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Applicability of - Reaffirmation of therapeutic privilege - Whether finding of negligence by Sessions Court Judge without basis in fact and in law

This was an appeal by the first defendant in a medical negligence action against the decision of the Sessions Court Judge who ordered that the first defendant pay general damages of RM10,000 for bereavement and special damages of RM5,000, interest thereon, and costs to the plaintiff. The plaintiff had commenced the action in the Sessions Court in her capacity as the administrator of the estate of her late mother, Tan Amoi @ Ong Ah Mauy (the deceased) claiming for general and special damages against the first defendant, a consultant general surgeon and Johore Specialist Hospital Sdn Bhd as the second defendant in respect of the alleged negligence of the first defendant which resulted in her late mother's death. The deceased was 57 years old and was deeply jaundiced when she saw the first defendant at the second defendant hospital. Almost immediately an ultrasound was done; it revealed biliary obstruction due to a stone at the lower end of the bile channel from the liver and gall bladder into the small intestine. An attempt by the first respondent to remove the stones by endoscopy had failed because the stone was impacted. After that, the deceased was advised to undergo an operation for the removal of the stones. The first defendant performed an operation, a procedure called cholecystescomy and managed to remove four stones. From then onwards, the deceased's condition deteriorated and she subsequently contracted acute respiratory distress syndrome (ARDS) and died. The first

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defendant had given the cause of death as multi-factorial; she had liver failure, acute pancreatitis and ARDS. Subsequently, the plaintiff brought a claim against the first and second defendants for medical negligence, alleging *inter alia*, that the first defendant was negligent in that he did not inform the deceased the risks of acute pancreatitis and ARDS coming from the operation.

Held (allowing first defendant's appeal with costs):

(1) Applying the principles in *Rogers v. Whitaker*, the Sessions Judge had failed to follow the principle that only material risks, and not minimal risks of injury arising out of the open cholecystectomy need to be disclosed to the plaintiff or the deceased. This was a serious misdirection which had occasioned a failure of justice which was of itself a sufficient ground to justify interference of this court. Moreover, the learned Sessions Judge had failed to realize that the materiality or non-materiality of a risk often required expert evidence and to take into account evidence of acceptable and up to standard medical practice in determining the nature and type of the risk involved in the proposed treatment or operation. Furthermore, the Sessions Judge had not considered and had not been able to appreciate sufficiently the question whether the plaintiff and any of the experts as well as the medical witnesses in the present case had said that liver failure, acute pancreatitis and ARDS were 'material risks' of the operation. (paras 22, 23 & 24)

(2) A close scrutiny of the evidence as contained in the record of appeal revealed that it had not been established that acute pancreatitis and ARDS were 'material risks of the operation.' On the contrary, there was in fact medical evidence to suggest that liver failure, pancreatitis and ARDS could arise as a result of the deceased's pre-existing condition, namely the obstruction of the common bile duct by gall stones. The risks of ARDS and pancreatitis accruing as a result of the operation were very rare and minimal. There was no duty to inform the deceased of the very rare risk of such a thing happening. The deceased must only be informed by the first defendant of the material risks of the proposed operation. (para 30)

(3) The deceased needed the operation. It was necessary for the purpose of saving her life. According to the first defendant in his evidence the removal of the stone from the bile duct was definitely mandatory and that if the stone was not removed she would eventually die. The first defendant therapeutic privilege in the present case outweighed any duty to warn her of any material risk which would result in her refusing the life saving operation. In this regard, *Rogers v. Whitaker* reaffirmed the therapeutic privilege principle. The finding of negligence made by the Sessions Judge was without basis in fact and in law. (para 35)

Case(s) referred to:

Bolam v. Friera Hospital Management [1957] 2 All ER 118 ***(refd)***

Dominic Puthucheary & Ors v. Dr. Goon Siew Fong & Anor [2007] 5 CLJ 38 CA ***(refd)***

Foo Fio Na v. Dr. Soo Fook Mun & Anor [2007] 1 CLJ 229 FC ***(refd)***

Liew Sin Kiong v. Dr Sharon DM Paulraj [1996] 2 CLJ 995 HC ***(refd)***

Rogers v. Whitaker [1993] 4 Med LR 79 ***(refd)***

Sideway v. Bethlem Royal Hospital Government & Ors [1985] 1 All ER 643 ***(refd)***

For the plaintiff - Julie Lim Siew Bee; M/s Julie Lim, Vasanthan & Co

For the 1st defendant - PS Ranjan (Manmohan Singh with him); M/s PS Ranjan & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Azahar Mohamed J:

[1] For ease of reference I shall refer to the parties in this appeal as they were referred to in the court below.

[2] This is an appeal by the 1st defendant in a medical negligence action against the decision of the learned Sessions Judge given on 24 March 2006, who ordered that the 1st defendant to pay general damages of RM10,000 for bereavement and special damages of RM5,000, interest thereon, and costs to the plaintiff.

[3] The plaintiff had commenced the action in the Sessions Court at Johor Bahru in her capacity as the administrator of the estate of her late mother, Tan Amoi @ Ong Ah Mauy (the deceased) claiming for general and special damages against the 1st defendant, a consultant general surgeon and Johore Specialist Hospital Sdn. Bhd. as the 2nd defendant in respect of the alleged negligence of the 1st defendant which resulted in her late mother's death.

[4] The deceased was 57 years old and was deeply jaundiced when she saw the 1st defendant on 17 October 1993 at the 2nd defendant hospital. Almost immediately an ultrasound was done; it revealed biliary obstruction due to a stone at the lower end of the bile channel from the liver and gall bladder into the small intestine. An attempt by the 1st defendant to remove the stones on 18 October 1993 by endoscopy had failed because the stone was impacted. Then, after that the deceased was advised to undergo an operation for the removal of the stones.

[5] The 1st defendant performed an operation, a procedure called cholecystesctomy on 19 October 1993 to remove the stones. During the operation, four stones were removed.

[6] From then onwards, the deceased's conditions deteriorated and she subsequently contracted acute respiratory distress syndrome (ARDS) and not long afterwards died on 2 November 1993. The 1st defendant had given the cause of death as multi-factorial; she had liver failure, acute pancreatitis and ARDS.

[7] After sometime, on 18 October 1996 the plaintiff next brought a claim against the 1st and 2nd defendants for medical negligence. It was alleged, *inter alia*, that the 1st defendant was negligent in that he did not inform the deceased the risks of acute pancreatitis and ARDS coming from the operation.

[8] During the trial before the learned Sessions Judge, the plaintiff, who is the deceased's daughter, gave evidence. The plaintiff did not call any expert medical witness in support of her claim.

A **[9]** The 1st defendant gave evidence. The 1st defendant also called as witnesses the three anesthetists who had attended to the deceased. He also called two expert medical witnesses, namely consultant general surgeon, Dr. Chong Keng Wee (DW5) and consultant anesthesiologist Dr. Sylvian Das (DW6).

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[10] A summary of the evidence on the clinical facts can be as follows. The 1st defendant had testified that he had advised the deceased and her family members that the deceased had obstructive jaundice caused by stones in the gall bladder. They C were advised that he will attempt to remove the stones by the endoscopy method (ERCP) failing which he will under-take an operation called cholecystectomy. The deceased consented to it. From the medical evidence, it was clear that the deceased who was deeply jaundiced required surgical intervention to remove the D stones which were the cause of the obstruction to the bile channel. Consultant anesthetist Dr. Tan Chin Yong (DW2) testified that the deceased was deeply jaundiced and not healthy. Consultant anesthetist Dr. Richard Lobo (DW4) testified that the deceased had severe jaundice and liver failure when she came to E the hospital. It was clear that the deceased had no choice but to have the stones removed. The relevant medical witnesses agreed that the deceased's life span would be reduced if she had failed to undergo the operation for the removal of the stones. DW5 said cholecystectomy was necessary because the common bile duct was F obstructed and that it was a serious condition. The fact that the bile did not flow when the stones obstructing the bile channel had been removed showed that the deceased was in liver failure. Following the operation the deceased developed two complications. First, she developed pancreatitis and later she developed ARDS.

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[11] It is important to point out that the learned Sessions Judge in his judgment held that the 1st defendant was not negligent when treating the said deceased based on the authority of *Bolam v. Friera Hospital Management* [1957] 2 All ER 118, about which more will be said further on at a later stage.

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[12] One important fact requires to be kept in mind. The only finding of negligence made by the learned Sessions Judge is as follows:

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Sebagai kesimpulan, berdasarkan kebarangkalian, satu-satunya tindakan kecuaian (the only negligence act) Defendan Pertama ialah kegagalan memberitahu Plaintiff dan simati mengenai risiko kemungkinan berlakunya ARDS and acute pancreatitis.

[13] In this manner, the learned Sessions Judge found the 1st defendant was negligent in that he had failed to inform the plaintiff and the deceased of the risks of ARDS and acute pancreatitis. From this finding a very interesting point emerges: what needs to be disclosed by a doctor to his patient of the risks of the proposed treatment and/or surgery. What then is the law on this point?

[14] To begin with, this is a good place to refer to the recent Federal Court decision in *Foo Fio Na v. Dr. Soo Fook Mun & Anor* [2007] 1 CLJ 229 in so far as the law is concerned. There, the appellant became totally paralyzed after undergoing surgery for neck injuries (dislocated vertebrae) at the 2nd respondent hospital. The appellant alleged that the paralysis was caused by the treatment procedure adopted by the 1st respondent, an orthopedic surgeon at the hospital, and in the circumstances sued the respondents for medical negligence. At the trial, the High Court judge found for the appellant, ruling: (i) that, while the appellant might have consented to the operation, she was not told of the risk of paralysis coming form the operation; and (ii) that the 1st respondent was negligent in that, in seeking to correct the dislocation, he had put in place a wire loop which had compressed the spinal cord and caused the paralysis. It was not disputed that, in deliberating on the issue of the scope of a doctor's duty of care, and concluding that the 1st respondent was negligent in administering a course of treatment that led to the appellant's paralysis, the learned judge had declined to apply the so-called 'Bolam test' or 'Bolam principle' – ie, the principle that a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that medical act, even if there exists another like body professing and subscribing a differing opinion – notwithstanding that such principle has been applied in a multitude of English and commonwealth cases. The respondents appealed whereof the Court of Appeal, whilst steering clear of commenting on the Bolam principle, nonetheless allowed the appeals on the ground that there was no evidence to establish that it was the surgery

performed by the 1st respondent that caused the paralysis. Upon the obtaining circumstances, the appellant applied for and obtained leave to appeal to the Federal Court, and following that posed the following, question of law for the determination of the apex court, namely: "whether the Bolam test as enunciated in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 in the area of medical negligence should apply in relation to all aspects of medical negligence."

[15] Siti Norma Yaakob FCJ (as she then was) in delivering the judgment of the Federal Court in *Foo Fio Na v. Dr Soo Fook Mun & Anor.* said at p. 246 of the report:

> That said, we are of the opinion that the Bolam test has no relevance to the duty and standard of care of a medical practitioner in providing advice to a patient on the inherent and material risks of the proposed treatment. The practitioner is duty bound by law to inform his patient who is capable of understanding and appreciating such information of the risks involved in any proposed treatment so as to enable the patient to make an election of whether to proceed with the proposed treatment with knowledge of the risks involved or decline to be subjected to such treatment.

[16] And in another instance further down at p. 258 of the report Her Ladyship said:

> Therefore there is a need for members of the medical profession to stand up to the wrong doings, if any, as is the case of professionals in other professions. In so doing, people involved in the medical negligence cases would be able to obtain better professional advice and that the courts would be appraised with evidence that would assist them in deliberations. On this basis, we are of the view that *Rogers v. Whitaker* test would be a more appropriate and a viable test of this millennium than the Bolam test.

[17] Undoubtedly, the decision of the Federal Court in *Foo Fio Na v. Dr Soo Fook Mun & Anor* represents the law on this subject as we apply today. I notice that our Court of Appeal in the case of *Dominic Puthucheary & Ors v. Dr. Goon Siew Fong & Anor* [2007] 5 CLJ 38 questioned the correctness of the judgment of the Federal Court in the *Foo Fio Na*'s case on the actual facts of the case.

[18] I need to say a few things about the case of *Foo Fio Na v. Dr Soo Fook Mun & Anor.* It seems to me that in the judgment of the Federal Court there was no discussion in it of materiality or non-materiality of a risk of injury arising out of the surgery. It appears to me as though in that case none of the experts had testified that the risk of the wire compressing the spinal cord was a material risk of the operation. Now, the Federal Court favours the test in *Rogers v. Whitaker* [1993] 4 Med. LR 79. Given this, it is therefore necessary at this point in time, to refer to that case in order to drive home particular aspects of the principles of law in so far as they are relevant to the present case.

[19] In *Rogers v. Whitaker* the plaintiff, Maree Whitaker, then aged 48, was almost totally blind in her right eye due to a penetrating injury at the age of nine. Her left eye was normal. She was advised by the defendant, an ophthalmic surgeon, that he could operate on her right eye to remove scar tissue and improve the sight in that eye. The plaintiff made clear to him her desire for information and that she wanted to be warned of the possible consequences of the operation. She did not ask him whether the operation could cause damage to the left eye. There was a 1-in-14,000 chance of sympathetic ophthalmia developing, but the defendant did not mention it. If he had done so, the plaintiff would not have accepted the risk, and would not have consented to the operation. On 15 June 1984, the plaintiff agreed to submit to surgery and the operation was properly carried out on 1 August 1984. Sympathetic ophthalmia resulted and she lost the sight of her left eye. By 1986 she had become virtually totally blind. In the plaintiff's action for negligence against the defendant, Campbell, J, sitting in common law jurisdiction of the Supreme Court of New South Wales, gave judgment in her favour awarding A$78,014 for past and A$104,059 for future economic loss. On appeal by the defendant on the ground that he had not been negligent, and on cross-appeal by the plaintiff on the ground that the amount of the damages was too low, the Court of Appeal of New South Wales held that the appeal and cross-appeal were dismissed because the trial judge was correct in finding that the defendant had failed to exercise reasonable skill and care in answering the plaintiff's general question about possible complications when he failed to mention the admitted low risk of sympathetic ophthalmia occurring in her good eye leading to possible blindness. The Court of Appeal also held that on the

A evidence the plaintiff had proved that 'but for' the negligent advice she would not have undergone surgery and accepted the risk; and the defendant's negligence was a cause of the sympathetic ophthalmia which followed the operation and the blindness which resulted. On appeal by the defendant to the High Court of B Australia the appeal was dismissed because it was for the courts to adjudicate on what was the appropriate standard of care after giving weight to 'the paramount consideration that a person is entitled to make his own decision about his life.' The High Court of Australia said that breach of duty of care was not to be C concluded on the basis of the expert medical evidence alone and that evidence of acceptable medical practice was a useful guide for the courts. And at p. 83 of the report the court said:

> We agree that the factors referred to in *F v. B* by King CJ must D all be considered by a medical practitioner in deciding whether to disclose or advice of some risk in a proposed procedure. The law should recognize that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment, a risk is material if, in a circumstances of the particular case, a reasonable person in the patient's position, if warned of the risk, would be likely to E attach significance to it or if the medical practitioner is or should reasonably be aware that the particular patient if warned of the risk, would be likely to attach significance to it. This duty is subject to the therapeutic privilege.

F **[20]** Some very important principles are established in *Rogers v. Whitaker.* A few of them, in so far as they are relevant to the present case, are:

i) Only material risks of injury arising out of treatment or surgery need to be disclosed to a patient;

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ii) The materiality or non-materiality of a risk often requires expert evidence; and

iii) The therapeutic privilege allows a surgeon to withhold disclosure a material risk in the best interests of a patient.

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[21] Coming back, then, to the present case. As I have stated earlier the only finding of negligence by the learned Sessions Judge was the 1st defendant's failure to inform the plaintiff and the deceased of the possible risks ie, acute pancreatitis and ARDS

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following the operation, cholecystectomy. Notice that the learned Sessions Judge did not say material risks or real risks; he merely said risko kemungkinan (possible risks), a very crucial point made by him that cannot be over-looked. I should also mention here that it was his view that it was not necessary to call expert medical evidence to support the claim that the plaintiff or the deceased must be informed of the risks of the proposed operation.

[22] Now, applying the principles of law in *Rogers v. Whitaker* which I have adverted to earlier, it is my judgment that the learned Sessions Judge had failed to follow the principle that only material risks, and not minimal risks of injury arising out of the open cholecystectomy need to be disclosed to the plaintiff or the deceased. This is a serious misdirection which has occasioned a failure of justice which is of itself a sufficient ground to justify interference of this court.

[23] Moreover, the learned Sessions Judge had failed to realize that the materiality or non-materiality of a risk often requires expert evidence and to take into account evidence of acceptable and up to standard medical practice in determining the nature and type of the risk involved in the proposed treatment or operation.

[24] Furthermore, the learned Sessions Judge had not considered and had not been able to appreciate sufficiently the question whether the plaintiff and any of the experts as well as the medical witnesses in the present case had said that liver failure, acute pancreatitis and ARDS were 'material risks' of the operation.

[25] Now, an appeal is by way of rehearing. I had reviewed the evidence from the record of appeal. In this context, I have kept in the forefront of my mind the issue as to whether ARDS and acute pancreatitis are material risks arising out of the operation carried out by the 1st defendant.

[26] In this regard, this is what the 1st defendant said at p. 251 of the record of appeal:

> very rare for such an operation to cause death.
>
> no high risk of ARDS developing in this case.

A At p. 259:

> The gall stone caused the pancreatitis.
>
> There is no known cause for ARDS and the condition is rare.

B At p. 260:

> The risks would have been the same if she were treated at other hospital for the gall stone.

At p. 268:

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> She died because of ARDS, not because of surgery.

At p. 300:

> Stone give rise to pancreatitis, even without exploring the bile
D duct.

[27] This is what the 1st defendant's expert witness DW5 Dr. Chang Keng Wee said at p. 343 of the record of appeal:

> Pancreatitis can result as the result of the presence of stone in
E the common bile duct.
>
> I cannot find any surgical error which causes pancreatitis.
>
> ARDS in this instance is the result of multisystem failure from the severe acute pancreatitis.

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> There was no surgical error which cause ARDS. ARDS in this instance is the result of multisystem failure from the severe acute pancreatitis. and

[28] Continuing with his evidence at p. 354 this is what DW5
G said:

> The presence of stone in CDB results in reflex of either bile of pancreatic juices into the pancreatic duct. This result in the activation of enzyme that results in acute pancreatitis.

H **[29]** As for the anaesthetic expert Dr. Sylvian Das (DW6) this is what he said at p. 362 of the record of appeal:

> Obstruction to common bile duct can give rise to sepsis.
>
> Severe pancreatitis can also give rise to sepsis.

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> Therefore, obstruction and/or pancreatitis can cause sepsis. Sepsis is a common complication. Nowhere did he say that pancreatitis was a "common complication."

He then added:

> In this case, the Dr. cannot do anything to prevent ARDS. The treatment given to the patient for liver failure, pancreatitis and ARDS was competent enough.

In this regard the material part of his evidence goes this way at p. 364 which is self explanatory:

> Pancreatitis poses very rare risk during gall bladder surgery.

[30] A close scrutiny of the evidence as contained in the record of appeal will reveal that it had not been established that acute pancreatitis and ARDS were 'material risks of the operation'. As stated at the beginning of this judgment, the plaintiff did not tender at all any expert evidence or factual medical evidence. Not one of the 1st defendant medical and expert witnesses said that acute pancreatitis and ARDS were material risks or commonly known risks of the operation. On the contrary, there's in fact medical evidence to suggest that liver failure, pancreatitis and ARDS could arise as a result of the deceased's pre-existing condition, namely the obstruction of the common bile duct by gall stones. The risks of ARDS and pancreatitis accruing as a result of the operation were very rare and minimal. In my view there was no duty to inform the deceased of the very rare risk of such a thing happening. The deceased must only be informed by the 1st defendant of the material risks of the proposed operation.

[31] Before leaving this topic there is one point that I want to make. The point is this: *Bolam*'s case said that the duty to warn a patient of a risk would not arise if the risk was only a 'minimal risk'. McNair J said in *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118 at p. 124 as follows:

> When a doctor is dealing with a mentally sick man and has a strong belief that his only hope of cure is submission to electro – convulsive therapy, the doctor cannot be criticized if he does not stress the dangers, **which he believes to be minimal,** which are involved in the treatment (emphasis added).

[32] (See also: *Sideway v. Bethlem Royal Hospital Government & Others* [1985] 1 All ER 643 and *Liew Sin Kiong v. Dr. Sharon D.M. Paulraj* [1996] 2 CLJ 995).

[33] In other words, the principle underlying in both *Bolam* and *Rogers v. Whitaker* is that a duty to warn a patient of the risk arising out of proposed treatment or operation arises only if the risk is a material risk, and not a minimal risk and that whether a risk is material or not is a question which often requires expert evidence, which is a useful guide for courts.

[34] Now, I come to a different point. Here, I agree with the arguments of learned counsel for the 1st defendant that if there was in fact a material risk as a result of the operation, the 1st defendant's therapeutic privilege justified the non-disclosure of it because of her severe medical problems. This privilege says that such information can be withheld if the disclosure would cause serious harm to the patient's health (see: *Sideway v. Board of Government Bethlem Royal Hospital & The Moudsley Hospital*).

[35] The deceased needed the operation. It was necessary for the purpose of saving her life. According to the 1st defendant in his evidence the removal of the stone from the bile duct was definitely mandatory and that if the stone was not removed she would eventually die. In my view, the 1st defendant therapeutic privilege in the present case outweighed any duty to warn her of any material risk which would result in her refusing the life saving operation. In this regard, *Rogers v. Whitaker* reaffirmed the therapeutic privilege principle.

[36] For all the reasons that I have given, it is my view that the finding of negligence made by the learned Sessions Judge was without basis in fact and in law.

[37] Consequently, I see no alternative but to allow the 1st defendant's appeal with costs. Finally, I would like to thank and commend En. P.S Ranjan, learned counsel for the 1st defendant and Cik Julie Lim, learned counsel for the plaintiff for their well considered arguments and for drawing my attention to the latest authorities on this subject.